

October 4, 2002

Mr. David W. Kaiser, Federal Consistency Coordinator
National Oceanic and Atmospheric Administration
Office of Ocean and Coastal Resource Management
1305 East West Hwy
Silver Spring, MD 20910-3278

Re: Comments on NOAA's Advance Notice of Proposed Rulemaking

Dear Mr. Kaiser:

Enclosed please find the Texas General Land Office's Comments on NOAA's Advance Notice of Proposed Rulemaking.

Sincerely,

Jim Bateman, Attorney
Environmental Law Section

**Texas General Land Office's Comments on
NOAA's Advance Notice of Proposed Rulemaking
15 CFR 930, in 67 Fed. Reg. No. 127, p. 44407**

October 4, 2002

General Comments

- I. There is a lack of a demonstrated need for a rule change. Generally, the majority of problems result from agencies' or applicants' lack of familiarity and experience with the CZMA consistency requirements and its recent revisions. Therefore, changes to the consistency regulations might not be as helpful as guidance documents and coordination with each state. Guidance would allow the states flexibility while working within the regulations already in place. Further, NOAA should allow more time for the states, federal agencies, and applicants to work with the recent comprehensive revisions to the federal consistency regulations before proposing further changes.
- II. Any proposed changes should not minimize the flexibility of each state to develop a consistency review program that is appropriate to the business and environmental conditions in that state.

The notice goes beyond OCS permit activities in that it is intended "to improve efficiencies in the Federal consistency procedures and Secretarial appeals process, particularly for energy development on the Outer Continental Shelf (OCS)." Such changes could go beyond OCS permit activities. For instance, the notice asks for comments on whether NOAA needs to further describe the scope and nature of information necessary for a State CMP and the Secretary to complete their CZMA reviews, under 15 CFR §930.58; comments on the Secretary's decision in a consistency appeal under CZMA §§307(c)(3)(A), (B) and 307(d); comments on a "general negative determination" provision similar to "general consistency determinations" under 15 CFR §930.36(c); and comments on whether the "listing" and "geographic location" descriptions in 15 CFR §930.53 should be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore.

- IV. The issues raised in this Advance Notice may also be addressed through NOAA's dedication of more staff resources to assist and guide federal agencies, permit applicants, and state programs in the consistency requirements. Recently, responses to federal consistency questions have been delayed due to staff workload.

Responses to the Questions in the ANPR

1. *Whether NOAA needs to further describe the scope and nature of information necessary for a State CMP and the Secretary to complete their CZMA reviews and the best way of informing Federal agencies and the industry of the information requirements.*

The Texas Coastal Management Program (Texas CMP) coordinates with federal agencies and applicants on the scope and nature of necessary information, and there have been few instances where there have been difficulties in obtaining necessary data and information. This concern would better be remedied through the development of guidance or memorandums of understanding between the state and federal agencies on coordinating information requirements. This would be more effective than creating a broad fix to isolated problems. The potential adverse consequences of too narrowly defining data and information needs might outweigh any inconveniences there may be with the existing requirements.

Furthermore, the states should be allowed to independently identify necessary data and information to meet the particular needs of their enforceable policies. The precise information needed to meet data and information requirements will vary with the nature and potential impact of an activity, the purpose and scope of the relevant enforceable policies, and policy differences between the states.

2. *Whether a definitive date by which the Secretary must issue a decision in a consistency appeal under CZMA sections 307(c)(3)(A), (B) and 307(d) can be established taking into consideration the standards of the Administrative Procedures Act and which, if any, Federal environmental reviews should be included in the administrative record to meet those standards.*

The Texas CMP has not experienced the need for a definitive date by which the Secretary must issue a decision in a consistency appeal. Neither the ANPR nor the Energy Report explain the cause of any delays in the Secretarial appeals process. Otherwise, we concur with the comments submitted by the Coastal States Organization (CSO) on this question.

3. *Whether there is a more effective way to coordinate the completion of Federal environmental review documents, the information needs of the States, MMS and the Secretary within the various statutory time frames of the CZMA and OCSLA.*

Any further guidance by NOAA on information needs of the state would be coordinated through state agreements with federal agencies that are affected. States should be allowed to develop procedures for coordinating information and timing of consistency reviews with affected federal agencies. For example, the Texas Coastal Coordination Council (Council) has developed a general consistency concurrence with the Minerals Management Service (MMS), which minimizes the scope and duration of

the review of an MMS OCS plan for consistency with the Texas Coastal Management Program. The General Concurrence lists the information that an applicant must submit to the MMS in support of the consistency certification when submitting an OCS Plan. Once MMS submits the OCS Plan to the Council, the general concurrence further provides a 15-day deadline for any three members of the Council to find that the activity may have significant adverse effects on coastal natural resource areas and refer the application to the Council for review. If the proposed plan is not referred, the Council is deemed to have concurred that the activity is consistent with the Texas CMP under the General Concurrence. This expedited review is based on the similarities between projects implemented under an OCS plan and the coastal natural resources affected.

4. *Whether a regulatory provision for a "general negative determination," similar to the existing regulation for "general consistency determinations," 15 C.F.R. 930.36(c), for repetitive Federal agency activities that a Federal agency determines will not have reasonably foreseeable coastal effects individually or cumulatively, would improve the efficiency of the Federal consistency process.*

We disagree that a "general negative determination" would be likely to lessen workloads. It is also not clear how a "general negative determination" would be beneficial for OCS activities which seem unlikely to satisfy the "no effects" standard. Activities that could affect Texas' open waters could be addressed through the development of a general concurrence or other document that would have the same effect as a general negative determination. Therefore, a general negative determination would be needlessly duplicative.

5. *Whether guidance or regulatory action is needed to assist Federal agencies and State CMPs in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and whether the "listing" and "geographic location" descriptions in 15 C.F.R. 930.53 should be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore.*

Flexibility is needed in the consistency process to ensure that unanticipated activities with far reaching effects are subject to consistency review. Activities in federal waters may also have secondary and cumulative impacts in state waters. The regulations are already clear as to how the effects test is to be interpreted under 15 C.F.R. 930.11(g) and 930.33; how notice of subject activities is to be provided through listing under 15 C.F.R. 930.34, 930.53, 930.154; and how unlisted activities having coastal effects are to be considered. Any revisions should allow for states' flexibility in determining whether an activity has coastal effects.

6. *Whether multiple federal approvals needed for an OCS EP or DPP should be or can be consolidated into a single consistency review. For instance, in addition to the permits described in detail in EPs and DPPs, whether other associated approvals, air and water permits not "described in detail" in an EP or DPP, can or should be consolidated in a single State consistency review of the EP or DPP.*

The need for a rule change on this subject is unclear. The consistency regulations already allow for such consolidation, under 15 C.F.R. 930.81.